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1996

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#### Recommended Citation

Janet L. Dolgin, *Response to Professor Woodhouse*, 28 Conn. L. Rev. 107 (1996)

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## RESPONSE TO PROFESSOR WOODHOUSE

Janet L. Dolgin\*

In her *Afterword*<sup>1</sup> to *Solomon's Dilemma: Exploring Parental Rights*, Professor Barbara Bennett Woodhouse asserts that I advocate judicial reliance on the notion of intent to determine parenthood in certain cases occasioned by reproductive technology.<sup>2</sup> I do not, and in the paper to which Professor Woodhouse referred<sup>3</sup> did not, advocate such a position. In my paper, I did analyze the implications of such reliance by a number of courts. Professor Woodhouse confused my analysis with advocacy. In so doing, Professor Woodhouse weakened the effects and potential benefits of both analysis and advocacy. Analysis does not necessarily imply advocacy, though obviously analysis can be, and often is, used in the service of advocacy, just as advocacy can become the subject of analysis. The dialectic between the two can further the purposes of each, but only as long as the distinction is clearly recognized. To underscore Professor Woodhouse's error, I shall review my analysis of judicial reliance on the notion of intent in recent cases involving reproductive technology.<sup>4</sup>

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\* Hofstra Law School, Professor of Law. B.A. Barnard College; J.D. Yale Law School; M.A., Ph.D. (Anthropology) Princeton University. Some of the issues considered are presented in greater detail in a book I am writing about the law's response to reproductive technology, scheduled to be published by New York University Press.

1. Barbara Bennett Woodhouse, *Afterword: Deconstructing Solomon's Dilemma*, 26 CONN. L. REV. 1525 (1994). Volume 26:4 comprises papers presented at the 1994 symposium entitled, *Solomon's Dilemma: Exploring Parental Rights*.

2. *Id.* at 1529.

3. Janet L. Dolgin, *The 'Intent' of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261 (1994).

Later, Professor Woodhouse criticized what she mistook for my advocacy of reliance on intent in such cases: "[w]hile I found the arguments raised by Professors Dolgin and Robson persuasive from an adult's point of view, I worry that children are objectified when their status is defined by others' intent." Woodhouse, *supra* note 2, at 1529. The reference to Professor Robson is to Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994).

4. The central cases analyzed in *The 'Intent' of Reproduction* include: *Davis v. Davis*, 842

Reproductive technology has confronted a society and a legal system already undergoing major transformations<sup>5</sup> in the meaning and scope of family with a newer and more profound disruption to traditional families—a disruption caused by the challenge reproductive technology poses to familiar biological assumptions through which families and familial relations have long been understood. For decades, Western society understood human reproduction to begin with sexual intercourse between a man and a woman, to include the fertilization of an egg in the body of the woman and then to pass to gestation and finally to the birth of a baby from the body of the woman in whom fertilization occurred.<sup>6</sup> Now, as a result of reproductive technology, the spatial and temporal dimensions of human reproduction have been disrupted dramatically. Embryos may be conceived outside a woman's body, and may be frozen for increasingly long periods of time before being allowed to develop into babies. Further, ova may be fertilized after both gamete donors have died, and news media report seriously on the possibility of pregnant men.<sup>7</sup>

In fact, changes stemming from the advent and explosive development of reproductive technology within the past twenty-five years have occurred so quickly that the culture almost cannot accommodate them. As a result of the disruptions posed by reproductive technology, which compound other, older disruptions to established understandings of the family in the West, courts, like the society they reflect, flounder in bewilderment.

Most generally, that bewilderment stems from the conflicting appeal, to the society and to the law, of traditional families—committed, hierarchically organized families, grounded in notions of inexorable truth—and of families created through choice, and in the name of au-

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S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied*, 114 S. Ct. 206 (1993), and *cert. dismissed sub. nom. Baby Boy J. v. Johnson*, 114 S. Ct. 374 (1993); *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994); and *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

5. Transformations in family law in the past several decades include, among other things, the acceptance of cohabitation agreements and antenuptial agreements and the so-called "divorce revolution" which replaced or augmented laws that permitted divorce only upon one party's successful accusation of the other's "fault" with no-fault criteria for divorce. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (discussing recent changes in family law).

6. See Janet L. Dolgin, *The Law Debates the Family: Reproductive Transformations*, 7 YALE J. L. & FEM. 37 (discussing implications of shifting vision of human reproduction).

7. Dick Teresi, *How to Get a Man Pregnant*, N.Y. TIMES, Nov. 27, 1994, § 6 (Magazine), at 54.

tonomous individuality. In responding to this conflict, courts have been constructing a series of strategic responses that seem, at least for the moment, to mediate between the allure of the traditional home, and the allure of families that replicate and amalgamate with the contractual forms of the marketplace.

Judicial reliance on intent in several recent cases involving reproductive technology represents one such response.<sup>8</sup> In *Johnson v. Calvert*<sup>9</sup>, for instance, a gestational surrogacy case involving a dispute between a surrogate, gestational mother and the "intending" parents who contributed the gametes from which the child involved was produced, the California Supreme Court determined the "natural mother" by reference to the parties' intentions.<sup>10</sup> The Court declared that when biological maternity is separated into a genetic and a gestational aspect, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."<sup>11</sup> In the Court's view, the intending mother was, almost in the nature of the case, the better mother, the mother whose *wish* to be a mother would constitute her social maternity.<sup>12</sup>

Thus, for the California Supreme Court, reliance on intent was not

8. Other, comparable judicial responses are being constructed at the same time. For instance, judicial reliance on the best-interests standard in cases occasioned by reproductive technology provides an alternative strategy for mediating among the conflicts and confusions that reproductive technology creates. This strategy, like reliance on the notion of intent, has failed to provide a satisfactory framework for imagining and regulating the changing family. See Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction, and the New Reproductive Technologies*, ARIZ. S. L.J. (forthcoming).

9. 851 P.2d at 782.

10. The Court was not using the notion of "intent" (and "intending parents") as a simple tool for discovering a child's best interests. The Court wrote:

The dissent would decide parentage based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notion of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions . . . .

851 P.2d at 782 n.10.

11. 851 P.2d at 782.

12. The court asserted:

The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child.

*Id.* at 783 (quoting Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986) (emphasis added by California Supreme Court)).

a simple substitute for reliance on the terms of the contract into which the parties had entered. The court could have relied on that contract, but it did not. Instead, it expressly determined that the contract entered into by Johnson and the Calverts did not violate California public policy and referred to that contract for evidence of the parties' intentions.

Not surprisingly, courts have been reluctant to rely unqualifiedly on contracts in such cases.<sup>13</sup> Such reliance would concede absolutely that traditional families have been replaced, in the law's view, by families created through bargained choice.<sup>14</sup> Courts have been reluctant to concede this. Instead, by relying on the notion of intent rather than directly on contracts, courts have been able to avoid the implications of completely amalgamating family law and contract law with regard to the parent-child connection.

Rather than acknowledge the move toward contract, courts have used the concept of intent to meld the prerogatives of contract and those of traditional, old-fashioned families. Thus, in *Johnson*, the California court made the notion of maternal intent resemble closely traditional understandings of biological maternity. Such intent, as described by the court fosters commitment and guarantees enduring love.

However, by associating maternal intent with biological maternity as it did, the *Johnson* court warped the meaning of intent since it can be associated legitimately only with a world of contract and choice and not with a world of inexorable truth and lasting hierarchical connections. Intent hinges on will and reason. Therefore, almost inevitably, intentions change. The *Johnson* court posited a primordial intention, immune from the consequences of subsequent shifts in the parties' intentions, but as a practical matter, intentions are always complicated and shifting.

Therefore, judicial reliance on intent in cases such as *Johnson*<sup>15</sup>

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13. See *infra* note 14.

14. The New Jersey trial court in *Baby M*, an early surrogacy dispute among a surrogate mother and the biological father along with his wife, seemed to uphold the contract into which the parties had entered. However, the trial court judge began his opinion by denying that his contractual analysis was determinative. Judge Sorkow for the New Jersey trial court wrote: "The primary issue to be determined by this litigation is what are the best interests of a child until now called 'Baby M.' All other concerns raised by counsel constitute commentary." In the *Matter of Baby M*, 525 A.2d 1128 (N.J. Sup. Ct. App. Div. 1987), *aff'd in part and rev'd in part*, 527 A.2d 1227 (N.J. 1988). See Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 539, n. 112 and accompanying text (1990) (analyzing Judge Sorkow's assertion).

15. In *McDonald v. McDonald* a New York court relied on *Johnson* to declare an intending and gestational, but not genetic, mother the real mother under New York Law. *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

cannot substitute for biology as the ground on which families are constructed and understood. Moreover, reliance on intent is unworkable in practice because no clear measure exists by which conflicting intentions can be delineated, identified and weighed.

As summarized briefly above, my analysis of the limitations of intent as mediator between the imperatives of two probably irreconcilable views of the family (and of reality) is just that: an analysis. It implies the ineffectiveness of intent as a judicial or social tool. It certainly does not imply or explicitly assert that courts should rely (as a number of courts have relied)<sup>16</sup> on the notion of intent to determine parentage in cases involving reproductive technology. Advocates of such use of intent exist.<sup>17</sup> I am not among them, however. My essay was designed to analyze, not to advocate. While analysis and advocacy can, and often should, serve one another, analysis can be effective only when it is rigorously distinguished from recommendation.

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16. See *supra* note 4.

17. See e.g., John Lawrence Hill, *What Does It Mean to Be a 'Parent'?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 Wisc. L. Rev. 297.

